UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

KATHLEEN DAVIS,	***)***	
	)	
Plaintiff	***)***	
	)	
v.	***)***	***Docket No. 04-07-P-S***
	)	
VERIZON NEW ENGLAND, INC., et al.,	***)***	
	)	
Defendants	***)***	

RECOMMENDED DECISION ON DEFENDANTS' MOTION TO DISMISS

Three of the four named defendants, Verizon New England, Inc., the Verizon Employee Benefits Committee ("VEBC") and Metropolitan Life Insurance Company ("MetLife") move to dismiss Count I of the First Amended Complaint in this action arising under the Employee Retirement Income Security Act ("ERISA"). All of the defendants, including the Chairperson of the VEBC, move to dismiss Count II. I recommend that the court grant the motion as to Count I only as to MetLife and for all defendants as to Count II.

I. Applicable Legal Standard

The motion invokes Fed. R. Civ. P. 12(b)(6). Defendants' Partial Motion to Dismiss, etc. ("Motion") (Docket No. 64) at 1. "In ruling on a motion to dismiss [under Rule 12(b)(6)], a court must accept as true all the factual allegations in the complaint and construe all reasonable inferences in favor of the plaintiff[]." *Alternative Energy, Inc. v. St. Paul Fire & Marine Ins. Co.*, 267 F.3d 30, 33 (1st Cir. 2001). The defendant is entitled to dismissal for failure to state a claim only if "it appears to a certainty that

the plaintiff would be unable to recover under any set of facts." *State St. Bank & Trust Co. v. Denman Tire Corp.*, 240 F.3d 83, 87 (1st Cir. 2001); *see also Wall v. Dion*, 257 F. Supp.2d 316, 318 (D. Me. 2003).

II. Factual and Procedural Background

Two of the moving parties, Verizon New England, Inc. ("Verizon") and MetLife, were named defendants in the original complaint in this action. Complaint (Docket No. 1) at 1. The chairperson of the VEBC and the VEBC have been added as defendants with the filing of the amended complaint. First Amended Complaint ("Amended Complaint") (Docket No. 62) at 1. Verizon and MetLife successfully moved to dismiss Counts I and III of the original complaint. Order Affirming Recommended Decision (Docket No. 61) and Recommended Decision on Motions of Defendants Metropolitan Life Insurance Company and Verizon New England, Inc. to Dismiss ("Recommended Decision") (Docket No. 33). Counts I and II of the amended complaint are based in part on factual allegations identical to those asserted in the original complaint and those facts will not be repeated here. They are set forth in the first recommended decision. Recommended Decision at 2-4. I will add here only the relevant facts alleged in the amended complaint that were not included in the original complaint.

There is no distinction between VEBC, the chairperson of the VEBC and Verizon. Amended Complaint ¶ 5. When the plaintiff requested from Verizon and MetLife documents relating to the employee benefits provided to the plaintiff's decedent, an employee of Verizon, before May 12, 2003, she was required to communicate her requests through counsel for Verizon, because she did not know to whom the requests should be made, not having been provided with the summary plan description ("SPD"). *Id.* ¶¶ 16, 28-31. Counsel for Verizon and MetLife directed the plaintiff to file a written claim for benefits on a MetLife form. *Id.* ¶ 34. On or about July 31, 2003 the plaintiff wrote to the Verizon Benefits Center at the

address provided for the VEBC in the SPD and requested information related to the plan. *Id*. ¶ 43. By letter dated October 28, 2003 addressed to the chairperson of the VEBC, the plaintiff requested a copy of the insurance policy underlying the special accident insurance described in the SPD. *Id*. ¶ 48. On or about October 30, 2003 the plaintiff received a letter from Verizon indicating that the special accident insurance was administered by Zurich NA. *Id*. ¶ 49. On or about November 18, 2003 plaintiff wrote to the chairperson of the VEBC and to MetLife and again requested a copy of the policy underlying the special accident insurance. *Id*. ¶ 50.

The plaintiff exhausted her administrative remedies by filing a claim for the special accident benefits with Zurich NA and appealing the denial of that claim. *Id*. ¶ 58. Zurich NA denied that appeal. *Id*. On or about April 2, 2204 counsel for Verizon provided the plaintiff with a copy of a document that purports to be the policy underlying the special accident insurance benefit. *Id*. ¶ 59. Counsel for MetLife indicated to the plaintiff that the insurance policy that provided the special accident insurance described in the SPD has been cancelled and replaced by a materially different benefit administered by Zurich NA. *Id*. ¶ 60. No amendments to the SPD reflect that the special accident insurance benefit has been cancelled or otherwise modified. *Id*. ¶ 61.

Verizon and MetLife have acted as the plan administrator with respect to the dissemination of information concerning plan benefits. *Id*. ¶ 64. The plaintiff's request for documents from counsel for Verizon, who had earlier accepted claims that would ordinarily be filed with the plan administrator, constituted a proper request for the documents pursuant to 29 U.S.C. § 1132(c)(1). *Id*. ¶ 65.

The SPD materially misrepresents the benefits provided by the plan. *Id*. ¶ 72. The defendants failed to notify the plaintiff of the discontinuance of the special accident benefit. *Id*. ¶ 73. The plaintiff acted

in reasonable reliance on the SPD. *Id*. ¶ 74. The plaintiff is entitled to claim the special accident benefit as described in the SPD. *Id*. ¶ 76.

III. Discussion

A. Count I

Count I of the amended complaint alleges that all of the defendants violated 29 U.S.C. § 1132(c)(1) by failing to produce plan documents. Amended Complaint ¶¶ 62-67. That statute provides that any plan administrator who fails or refuses to comply with a request for any information which the administrator is required to furnish to a participant or beneficiary within 30 days after the request "may in the court's discretion be personally liable to such participant or beneficiary in the amount of up to $100 a day from the date of such failure or refusal." 29 U.S.C. § 1132(c)(1). The defendants other than the chairperson of the VEBC contend that the amended complaint fails to provide any basis for the drawing of a reasonable inference that any of them acted as the plan administrator. Motion at 3-6.

For purposes of section 1132(c)(1), the term "administrator" is defined as follows:

> The term "administrator" means —
>
> > **(i)** the person specifically so designated by the terms of the instrument under which the plan is operated;
> >
> > **(ii)** If an administrator is not so designated, the plan sponsor; or
> >
> > **(iii)** in the case of a plan for which an administrator is not designated and a plan sponsor cannot be identified, such other person as the Secretary may be regulations prescribe.

29 U.S.C. § 1002(16)(A). The SPD in this case identifies the chairperson of the VEBC as the plan administrator. Amended Complaint ¶ 3.

Verizon contends, Motion at 4-5, that nothing has been added to the amended complaint that could alter this court's conclusion that the initial complaint could not reasonably be construed to allege that

Verizon acted as the plan administrator with respect to dissemination of information concerning plan benefits, Recommended Decision at 7-9. *See Law v. Ernst & Young*, 956 F.2d 364, 367, 373 (1st Cir. 1992). The plaintiff responds that she has now alleged that Verizon "acted in the capacity of administrator under the Plan at issue." Plaintiff's Response in Opposition to Defendants' Partial Motion to Dismiss ("Opposition") (Docket No. 68) at 2. She identifies the following "additional" paragraphs of the amended complaint as supporting this position: 4- 6, 26, 28-29, 31, 34, 36, 39 and 51-53. *Id*. at 3. Of these paragraphs, only 4-6, 29, 34 and 59 differ from allegations included in the initial complaint, which was found insufficient to allege that Verizon acted in the capacity of plan administrator for purposes of the plaintiff's claim. Recommended Decision at 7-9.

The new material does allege that "there is no distinction between Defendant VEBC or Defendant Chairperson of the VEBC and Defendant Verizon," Amended Complaint ¶ 5; that the VEBC "does not appear to be a legally established entity in Maine, New Hampshire, New York, Delaware or Illinois," *id*. ¶ 6;[1] that before the plaintiff obtained the SPD "VEBC appeared to have no distinct legal identity apart from Defendant Verizon," so that she "was required to communicate its [sic] requests for plan related documents through counsel for Defendant Verizon," *id*. ¶ 29; and that counsel for Verizon produced a copy of a document "that purports to be the policy underlying the Special Accident Insurance benefit sought by Plaintiff," *id*. ¶ 59. These additions were apparently made in response to my observations in connection with the first motion to dismiss. Recommended Decision at 7-9. As I noted at that time, the facts alone that the plaintiff sought documents from counsel for a party or that the party produced certain documents are not sufficient to give rise to a reasonable inference that the party thereby acted as the plan administrator. *Id*. at

[1] Verizon is alleged to be a New York corporation. Amended Complaint ¶ 2. Metropolitan is alleged to be a Delaware (*continued on next page*)

7-9. The amended complaint still does not allege directly that Verizon acted as administrator of the plan. It does not allege that Verizon controls the VEBC or its chairperson. *See id*. at 8. However, it may reasonably be read to allege that Verizon, the VEBC and its chairperson are the same entity. *Id*. The defendants contend that paragraph 5 of the amended complaint, which provides the only basis for such a reading, is conclusory, Reply Brief in Support of Defendants' Partial Motion to Dismiss (Docket No. 69) at 2-3, but that allegation, while minimal, is sufficiently specific under the rules of pleading. *See, e.g.*, *Langadinos v. American Airlines, Inc.*, 199 F.3d 68, 72-73 (1st Cir. 2000). As to Verizon and the VEBC, the motion to dismiss Count I should be denied.

The same is not true of MetLife, however. The amended complaint does not allege that MetLife and the chairperson of the VEBC, the plan administrator identified in the SPD, were or are essentially the same entity. The only new allegation in the amended complaint among those identified by the plaintiff as such that refers to MetLife is the assertion that "[c]ounsel for MetLife and Verizon directed counsel for Plaintiff to file a written claim for benefits on a MetLife claim form." Amended Complaint ¶ 34. The plaintiff contends that all of the additions to the amended complaint "compel[] the conclusion . . . that the administration of the Plan, at least for the purposes of Plaintiff's claim, was in fact being conducted by Verizon and MetLife." Opposition at 3. To the contrary, the fact that an attorney for MetLife directed the plaintiff to file a claim for benefits on a MetLife form, for benefits which at the time appeared to be administered by MetLife, Amended Complaint ¶ 23,[2] cannot support an inference that MetLife thereby was acting as the plan administrator, as distinct from the benefits administrator. The amended complaint cannot

corporation. *Id*. ¶ 7. The plaintiff's decedent is alleged to have died in New Hampshire in the course of his employment. *Id*. ¶ 10. The reason for the inclusion of Illinois in paragraph 6 of the amended complaint is not apparent.

[2] Indeed, the plaintiff alleges that such a submission "is the proper procedure for making a claim for benefits under the Plan." Amended Complaint ¶ 35.

reasonably be read to allege that MetLife was acting as the plan administrator with respect to the plaintiff's claims for benefits, for the reasons set forth in my discussion of the initial motion to dismiss, Recommended Decision at 6-7, and because the amended complaint adds nothing to the initial complaint that would support a different outcome. MetLife is entitled to dismissal of Count I.

B. Count II

All of the defendants seek dismissal of Count II of the amended complaint, a recasting of Count III as it appeared in the initial complaint, *compare* Complaint ¶¶ 62-65 *with* Amended Complaint ¶¶ 68-76, contending that it fails to state a claim on which relief may be granted for essentially the same reasons adopted by the court in granting the motion to dismiss that count in the earlier complaint, Motion at 6-8. The plaintiff does not respond directly to this argument. Instead, she contends that her claim for "detrimental reliance upon inaccurate summary plan description" and her request for equitable relief "including enforcement of the terms of the inaccurate SPD, by ordering payment of the Special Accident Insurance benefits," Amended Complaint at 12-13, are not barred by *Great-West Life & Annuity v. Knudson*, 534 U.S. 204 (2002), because "[i]t remains text book law that where there is a conflict between an ERISA plan document and a SPD, the provisions of the SPD control." Opposition at 6-7. She cites four cases decided after *Knudson* in which she contends that "actions to recover wrongly denied benefits on the basis of terms spelled out in a faulty SPD have continued to go forward without discussion of *Knudson*." *Id*. at 7.

Neither the amended complaint nor the plaintiff's opposition specifies the section of ERISA under which Count III is brought, but the opposition does refer to 29 U.S.C. § 1132(a)(3). Opposition at 7. She does not take issue with the defendants' assertion that this count could only be asserted under that section,

Motion at 6, and that assertion appears to be correct. The section provides that a civil action may be brought

> by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan . . . .

29 U.S.C. § 1132(a)(3). As I noted in my recommended decision on the first motion to dismiss, with reference to a similar demand for relief in Count III of the original complaint, the plaintiff's demand for relief is one for compensatory damages, not for equitable relief. Recommended Decision at 12. Equitable relief available under ERISA does not include compensatory damages. *LaRocca v. Borden, Inc.*, 276 F.3d 22, 28 (1st Cir. 2002) (finding that request for $2.8 million characterized as restitution was not request for "appropriate equitable relief" under section 1132(a)(3)). In my earlier recommended decision, I also noted that a remedy is not available under section 1132(a)(3) where ERISA provides an adequate remedy elsewhere. Recommended Decision at 12 (citing *LaRocca*). In the initial complaint, the plaintiff sought such a remedy in Count II. *Id*. at 12-13; Complaint ¶¶ 59-61. The fact that she has chosen not to pursue such a remedy in her amended complaint does not mean that it is unavailable. *See LaRocca*, 276 F.3d at 28-29; *Ogden v. Blue Bell Creameries U.S.A., Inc.*, 348 F.3d 1284, 1285 (11th Cir. 2003) (no cause of action under § 1132(a)(3) where adequate remedy provided elsewhere in ERISA even if *res judicata* now bars adequate remedy thus provided).

None of the case law cited by the plaintiff requires a different outcome for this iteration of the claim. In *Knudson*, the Supreme Court held that relief in the nature of enforcement of a contractual obligation to pay money is not available under section 1132(a)(3). 534 U.S. at 221. This is precisely what the plaintiff demands by seeking "enforcement of the terms of the inaccurate SPD, by ordering payment of" benefits.

Amended Complaint at 12-13. In *Govoni v. Bricklayers, Masons & Plasterers Int'l Union of Am., Local No. 5 Pension Fund*, 732 F.2d 250 (1st Cir. 1984), decided 18 years before *Knudson*, the First Circuit held only that a plan participant was required to show reliance or prejudice in pursuing a claim based on a faulty plan description. *Id*. at 252. There was no discussion of the nature of the relief sought nor was section 1132(a)(3) mentioned.[3] Similarly, the question of the appropriate characterization of the relief sought — whether it is equitable or compensatory — is not addressed, and *Knudsen* is not mentioned, in *Burke v. Kodak Retirement Income Plan*, 336 F.3d 103, 110-14 (2d Cir. 2003); *Burstein v. Ret. Account Plan for Employees of Allegheny Health Educ. & Research Found.*, 334 F.3d 365, 376-80 (3d Cir. 2003); *Feifer v. Prudential Ins. Co. of Am.*, 306 F.3d 1202, 1209-14 (2d Cir. 2002) (claim brought under § 1132(a)(1)); or *Haymond v. Eighth Dist. Elec. Benefit Fund*, 36 Fed.Appx. 369, 372-74 (10th Cir. 2002). Accordingly, these cases, cited by the plaintiff, Opposition at 7, do not provide any support for the plaintiff's contention that she may proceed with her claim for benefits under the SPD through section 1132(a)(3) without regard to *Knudson*. That case is in fact controlling here. The defendants are entitled to dismissal of Count II.

IV. Conclusion

For the foregoing reasons, I recommend that the defendants' motion to dismiss be **GRANTED** as to Count II and as to claims asserted against defendant Metropolitan Life Insurance Company in Count I and otherwise **DENIED**.

[3] The same is true of another First Circuit case cited by the plaintiff. *Bachelder v. Communications Satellite Corp.*, 837 F.2d 519, 523 (1st Cir. 1988). In *Mauser v. Raytheon Co. Pension Plan for Salaried Employees*, 239 F.3d 51, 55-56 (1st Cir. 2001), the only other First Circuit case cited by the plaintiff, the question whether the relief sought by the plaintiff was equitable apparently was not raised, and the First Circuit need not have reached that question in any event because it (*continued on next page*)

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 22nd day of September 2004.

/s/ David M. Cohen
David M. Cohen
United States Magistrate Judge

Plaintiff

KATHLEEN DAVIS represented by **NICHOLAS BULL**
THOMPSON, BULL, FUREY, BASS & MACCOLL, LLC, P.A.
120 EXCHANGE STREET
P.O. BOX 447
PORTLAND, ME 4112-447
774-7600
Email: nbull@thomport.com

BRADFORD R. BOWMAN
THOMPSON, BULL, FUREY, BASS & MACCOLL, LLC, P.A.
120 EXCHANGE STREET
P.O. BOX 447
PORTLAND, ME 4112-447
774-7600
Email: bbowman@thomport.com

---

held that the plaintiff had failed to demonstrate reliance or prejudice, the standard developed in *Govoni*.

V.

Defendant

VERIZON NEW ENGLAND INCORPORATED

represented by **MARTHA DYE**
O'MELVENY & MYERS
1625 EYE STREET, N.W.
WASHINGTON, DC 20006
202-383-5300
Email: mdye@omm.com

GERALDINE G. SANCHEZ
PIERCE, ATWOOD LLP
ONE MONUMENT SQUARE
PORTLAND, ME 04101-1110
791-1100
Email: gsanchez@pierceatwood.com

MARK E. PORADA
PIERCE, ATWOOD LLP
ONE MONUMENT SQUARE
PORTLAND, ME 04101-1110
791-1100
Email: mporada@pierceatwood.com